Supreme Court, U.S.
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No. 95-1031

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES A. GHENT, JR.,

Petitioner,

vs.

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TONY E. GALLEGOS, GILBERT F. CASELLAS, CORRADO GIGANTE, STATE OF NEW JERSEY, SUPREME COURT OF NEW JERSEY, ROBERT D. LIPSHER, FEE ARBITRATION COMMITTEE DISTRICT XI, et al., ANTHONY BENEVENTO, ROBERT C. LASALLE, MARY E. MARBAN, THOMAS ZICCARDI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

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NEW POINTS RAISED IN THE BRIEF IN OPPOSITION

1. Whether the Respondents are absolutely immune from liability for alleged invidious conduct which violates the Due Process Clause and the Equal Protection Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Whether a judicial determination of absolute immunity is a final order creating a right to immediate appellate review under 28 U.S.C. § 1291?

3. What constitutes a compelling reason for further review by the Supreme Court of the United States?

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STATEMENT

The Respondents' Brief in Opposition is factually incorrect in the following instances:

1. The Petitioner has never stated that there currently exists or ever existed an employee-employer relationship with the Fee Arbitration Committee, as stated on pages 2 and 5 of Respondents' Brief.

2. The Respondents make a comparison between the present case and *Borelli* by suggesting that as a basis for dismissal "[this Petitioner] . . . did not articulate the harm [he] had suffered." See page 4 of Respondents' Brief. This is not the factual situation in the present case since Petitioner's Complaint articulates the property interest lost (wages from employment, etc.) in Count One of the Complaint, and other damages elsewhere in the Complaint.

The determination by the District Court that certain respondents are **absolutely immune** effectively forecloses any further adjudication against those parties even though the District Court's dismissal was without prejudice.

The term "without prejudice" may be used as a strategic judicial tool which can frustrate litigants attempting to seek a judicial remedy.

POINT I

Absolute Immunity: A Question Of Law And Fact

The Respondents' Brief in Opposition relies on the District Court's determination that they are absolutely immune. Whether absolute immunity rests with the Respondents is doubtful, and should be subjected to adjudication on the merits. *Mitchell v. Forsyth*, 427 U.S. 511 (1985).

The Third Circuit Court of Appeals addressed the issue of immunity in *Forsyth v. Kleindienst*, 599 F.2d 1203 (3d Cir. 1979) and held that absolute immunity has been granted to prosecutors in their decision to present a criminal action. The Appellate Court further stated that "federal officers are only entitled to qualified or good faith, immunity." Id. at 1216.

The *Forsyth* Court relied partially on *Butz v. Economou*, 438 U.S. 478 (1978) from which the Appellate Court related that the official claiming immunity has the burden to demonstrate "exceptional circumstances." No such showing was required by the District Court. Furthermore, the *Forsyth* Court ruled that qualified or "good faith" immunity would not apply where the actors knew or should have known of violations of the constitutional rights of an individual, such as violations of the Fifth and Fourteenth Amendments, as alleged in this case.

It would appear that the District Court is in violation of the Supremacy Clause.

Article VI of the United States Constitution (The Supremacy Clause) provides in pertinent part:

> This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State

> shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[1]

This Court has held that absolute immunity does not apply to Cabinet officers or other high officials. *Mitchell*, supra. See also *Harlow v. Fitzgerald*, 457 U.S. 800, 808, 102 S. Ct. 2727, 2723 (1982), *Nixon v. Fitzgerald*, 457 U.S. at 747, 102 S.Ct. at 2700 (1982). Constitutional rights are more than precatory, and litigants who take refuge in those rights must be able to rely on the courts for "the protection of their justiciable constitutional rights." *Davis v. Passman*, 442 U.S. 228, 242, 99 S. Ct. 2264, 2275 (1975).

In light of the above, the alleged invidious conduct of the Respondents must be judicially reviewed for a determination of law and fact.

POINT II

Absolute Immunity Is A Final Order

In *Mitchell*, supra, this Court addressed the issue of Immunity as a final order, as applied to the final order provisions of 28 U.S.C. § 1291 and concluded that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment." Id. at 472 U.S. 525. However, the Court recognized the exception where "the defendant's actions violated clearly established law and [were] therefore not within the scope of qualified immunity." Id. at 527. In this instance, as in the present

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[1]Lawrence H. Tribe, American Constitutional Law, Second Edition, (1988), xl.

case before the Court, the Respondents are not immune. Therefore, the issue of immunity should have been appealable under § 1291.

POINT III

Discriminatory Practices In Violation Of The United States Constitution Constitute A Compelling Reason For Further Review By This Court

The Respondents' Brief states that " . . . There is no compelling reason for further review by this Court." Id. at ii.

In American Constitutional Law, by Lawrence Tribe, the author discusses a fundamental right to equal litigation opportunity. Id. at 1461. In *Adarand v. Pena*, 115 S.Ct. 2097 (1995), this Court addressed the need for "detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed," where racial classifications are involved. Id. at 2112. And they also held that a prerequisite for racial classifications "serving a compelling government interest" is that it be "narrowly tailored to further that interest." Id. at 2117. Jurists who expressed an opinion within the Court's decision stated that provisions in the Constitution for equal protection of the law was the method by which discrimination should be remedied. The same issue of discriminatory practices appears in this case and therefore constitutes a compelling reason for further review by this court.

A state action that distinguished citizens by race to be "narrowly tailored to further a compelling governmental interest" was found in *Shaw v. Reno*, 113 S.Ct. 2816, 2825 (1993). Absent a compelling governmental justification,

inequalities in the administration of fundamental rights which bear on liberty, property, or other interests have been held unconstitutional. See Tribe, Constitutional Law, 1454. Other rights have been held to be fundamental "because of feared invidious discrimination." Id. at 1463. Compelling governmental interest is associated with equal protection strict scrutiny and has focussed on discrimination against "racial and ancestral groups." Id. at 1465.

CONCLUSION

This case presents compelling constitutional issues. Therefore, further review by this Court is required to preserve settled legal principles and to comply with the dictates of the Constitution and Federal Law.

DATED: February 29, 1996

Respectfully submitted,

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